tracks upon a velocipede on his way to work when he was overtaken by a train and killed. The accident and death occurred on one of the main lines of the defendant and not in a railroad yard. It was claimed by the administrator that the defendant owed a duty to keep a lookout for men who might be riding ahead of the train on a velocipede or who might be in or about the tracks. The court held in that case that there was no such positive duty devolving upon the railroad company. There was no proof in the *Nixon* case that it was customary for the engineer in charge of the locomotive to keep a lookout for men who might be upon the tracks in section work nor was it customary to give them any warning. Neither was there any evidence that the train was being operated in an unusual manner. There was no custom relied upon so far as the decision shows. The sole question was whether the railway company "as toward the deceased" owed a duty to keep a lookout ahead.

Manifestly, this case is not authority for holding that the defendant in the instant case owed no duty to the plaintiff whose duties customarily required him to cross between cars standing on this team track, since the switching movement of the cars in question on to the team track exposed the plaintiff to an unusual danger by reason of defendant's "departure from the practice generally followed."

But two cases are cited by the defendant which in any way involve a custom of warning. In one of these, *Cincinnati, etc., R. Co.* v. *Swann,* 160 Ky. 458 (169 S. W. 886), the plaintiff was a foreman whose duty required him to watch for approaching trains. It was held in that case that in the circumstances, he was not entitled to rely on the observance by train employees of rules requiring them to slow down, etc. The rule of law announced in this case

manifestly applies only to employees whose specific duties require them to watch for approaching trains and to warn others of their approach.

The doctrine announced in the second case, *Williams* v. *C. & A. R. R. Co.*, 135 Ill. 491, has never been applied to employees of railroad companies. Such employees are clearly under the decisions heretofore cited, entitled to the protection afforded by rules or general custom.

We submit that even if plaintiff knew that cars were liable to be switched on the team track in question and assumed the risk of such customary switching operation, nevertheless "he did not assume the increased risk attributable not to the method, but to negligence in pursuing it."

Two cases decided by the Circuit Court of Appeals of the United States, Third Circuit, very clearly give the applicable rules and distinguish the *Aerkfetz* and other cases relied upon by the defendant.

The case of *Lehigh Valley R. Co.* v. *Doktor, supra,* 290 Fed. 760, involved an injury to a track worker. We quote from the case:

> "At the trial the plaintiff, in support of his averment of duty, testified there was a yard custom in such cases to give warning. * * * The evidence of the defendant's custom and therefore of its duty to warn trackmen * * * was sharply controverted."

Following the above statement the court said:

> "This case raises no new question of law. It is distinguished from *Aerkfetz* v. *Humphreys,* 145 U. S. 418, 12 Sup. Ct. 835, 36 L. Ed. 758, and *Connelley* v. *Pennsylvania R. Co.,* 228 Fed. 322, 142 C. C. A. 614, in that the injured workmen in those cases were trackwalkers, who, from the very nature of their work, were required to look out for themselves, while here

the injured man was a trackworker, who, from the very nature of gang work, could not look out for himself when so employed. Nor does this case fall within the class where there is neither a custom of giving warning nor a way of giving warning in freight yards as decided in *Hines, Director General* v. *Jasko* (C. C. A.), 266 Fed. 336. Rather it comes within the law of those cases where a warning of some kind is possible and where it is customary to give it as in *Hines, Director General* v. *Knehr* (C. C. A.), 266 Fed. 340, 341; *Erie R. Co.* v. *Healy* (C. C. A.), 266 Fed. 342, 343; *Director General* v. *Templin* (C. C. A.), 268 Fed. 483, 484, Certiorari denied, 254 U. S. 656, 41 Sup. Ct. 218, 65 L. Ed. 460. Therefore the question of the existence of the two customs of warning, and of the defendant's corresponding duty, was a question of fact properly submitted to the jury—if the evidence was sufficient to sustain a finding."

The cases cited by defendant, viz., *Chicago, etc., R. Co.* v. *Coogan,* 271 U. S. 472; *Gulf, etc., R. R.* v. *Wells,* 275 U. S. 455; *New Orleans & N. E. R. Co.* v. *Harris,* 247 U. S. 367, and *Western Atlantic R. Co.* v. *Hughes,* 73 L. Ed. 268, relative to the sufficiency of evidence to support a charge of negligence, as applied in Federal Courts, are clearly and readily distinguishable from the instant case.

In the *Coogan* case, it was held that in order to support the charge of negligence or show there was any causal relation between the negligence charged and the injury, it would be necessary to resort to mere speculation or conjecture.

In the *Wells* case, wherein a brakeman was attempting to board a freight train moving ten miles an hour, it was held that there was no evidence that the engineer knew or *should have known* that he was not on the train, but was attempting to get on it after it had started, and was in a situation in which a jerk of the train would be dangerous to him.

In the *Harris* case, it was held erroneous to apply a State statute making proof of injury by an engine propelled by steam, *prima facie* evidence of negligence in an action for damages.

In *Western Atlantic R. Co.* v. *Hughes*, 73 L. Ed. 268, it was urged by the defendant that the courts of Georgia erred in applying the scintilla rule of evidence. This court, after reaffirming the doctrine previously announced in a great many cases, that submission to the jury of contested issues is not required if there is only a scintilla of evidence, said:

> "We need not consider whether the rule prevailing in Georgia differs substantially from the Federal rule. For even under the Federal rule, it was proper to submit the case to the jury. * * * At the second trial, thirty-three witnesses testified. Some of the testimony given by the witnesses for the railroad would, if believed, have entitled it to the verdict as a matter of law. Some of the testimony given by witnesses called by the plaintiff does not seem to us persuasive. The credibility of the witnesses and the weight of the evidence were obviously matters for the jury. The defendant was not entitled to a directed verdict."

The evidence for the plaintiff in this case clearly outweighs defendant's evidence on all material controverted questions of fact. In any event, the defendant was not entitled to a directed verdict.

It is respectfully submitted that for the reasons stated, this case be dismissed for want of jurisdiction, or if jurisdiction exists, that the judgment of the Appellate Court of Illinois be affirmed.

Joseph D. Ryan

John T. Burnhall

Counsel for Respondent, Nick Mihas.

APPENDIX.

Section 11, Article 6, Constitution of 1870 of the State of Illinois:

"After the year of our Lord 1874, inferior appellate courts, of uniform organization and jurisdiction, may be created in districts formed for that purpose, to which such appeals and writs of error as the General Assembly may provide may be prosecuted from circuit and other courts, and from which appeals and writs of error shall lie to the supreme court, in all criminal cases, and cases in which a franchise or freehold or the validity of a statute is involved, and in such other cases as may be provided by law. Such appellate courts shall be held by such number of judges of the circuit courts, and at such times and places, and in such manner, as may be provided by law; but no judge shall sit in review upon cases decided by him, nor shall said judges receive any additional compensation for such services."

OPINION

SUPREME COURT OF THE UNITED STATES.

No. 21.—October Term, 1929.

The Chesapeake and Ohio Railway Company, Petitioner, *vs.* Nick Mihas.	On Writ of Certiorari to the Appellate Court for the First District of the State of Illinois and/or to the Supreme Court of the State of Illinois.

[November 25, 1929.]

Mr. Justice Sutherland delivered the opinion of the Court.

Section 121, c. 110, Cahill's Revised Statutes of Illinois, 1927, provides that, except in cases where an appeal or writ of error will lie under the Constitution from the state appellate courts to the supreme court, the judgments of the former shall be final, except (1) in certain cases where, in the opinion of the appellate court judges, questions of importance are involved, such judges may grant appeals to the supreme court on petition, in which case the grounds for granting such appeals shall be certified, and (2) the supreme court may require such cases made final in the appellate courts to be certified for review and determination with the same effect as though carried up by appeal or writ of error. Application was made to the state supreme court for a writ to review the judgment of the appellate court in this case and was denied. The jurisdiction of this Court in granting the petition for a writ of certiorari is now attacked on the ground that petitioner did not exhaust its remedies under state law, because it failed also to apply to the appellate court for a certificate of importance and an appeal as provided in subdivision (1) above. In *Minneapolis, &c. R. Co.* v. *Rock*, 279 U. S. 410, we had under consideration the same question and held that the denial of an application for certiorari by the state supreme court was in effect an affirmance of the judgment, and that it would be unreasonable to require an application to the appellate court for a certificate of importance and appeal when the

supreme court had thus approved the judgment. This Court, therefore, has jurisdiction; and we proceed to consider the merits.

The respondent brought an action in the superior court of Cook County to recover damages for a personal injury suffered while engaged as an employee of petitioner in interstate commerce. That court at the conclusion of the evidence denied a motion for a directed verdict in favor of petitioner. Upon a verdict of the jury, judgment was rendered for respondent, which the appellate court, on appeal, affirmed. 249 Ill. App. 446.

Petitioner seeks to reverse the judgment of the appellate court on the ground, among others, that there was no proof of negligence and the motion for a directed verdict should have been sustained.

Mihas was employed by the railway company to care for switch lights and lamps along the right of way, and had been thus employed for about four years prior to the injury. He had lived all that time near the switch tracks in the yards at Peru, Indiana. He was thoroughly familiar with the switching operations and with the fact that they were carried on every day, usually between the hours of six and seven o'clock in the morning. In doing his work he used a small speeder car, which was kept on the opposite side of the tracks from where he lived; and it was necessary for him to cross these tracks to get the car. About ten minutes before seven o'clock on the morning of the accident, as he came from his house, he saw two men with a truck going away from a coal car which they had been unloading. He testified that he looked to one side and the other, but did not see or hear any train or cars approaching. Proceeding directly from his house, on his way across the tracks to get the speeder car, he attempted to climb over a coal car standing with a number of others on a switch track. While in the act of doing so, a string of nine cars was forcibly propelled by means of a flying switch against the standing cars with such violence that Mihas was thrown between two cars and severely injured. The cars being switched moved at the rate of four or five miles per hour, which was not an unusual speed for that kind of an operation. Those engaged in the movement had no knowledge of Mihas' position or of his movements. One of the standing cars contained coal, and shortly prior to the switching operation the two men seen by Mihas had been engaged in unloading the coal into a truck, but at the time of the impact they had driven off and were

some distance away from the standing cars. There was evidence to the effect that it was customary for train men personally to notify persons engaged in unloading cars before making a switching operation likely to affect them; but that such notice was exclusively for men so engaged. Mihas testified that he knew of this practice. He heard no notice given to the men on the occasion in question; but whether he crossed the cars relying upon that fact the testimony does not make clear, although it is assumed in the briefs and arguments and we assume that he did. He could have crossed in a roundabout way without climbing over the cars, and his selection of the latter method was for his own convenience. Mihas testified that his foreman knew about his having to cross the tracks and had never told him not to cross between the cars; but there is no evidence that the foreman or any agent or employee of the company had knowledge that Mihas ever crossed by climbing over standing cars.

The negligence complained of is that in making the flying switch the standing cars were struck with great and unnecessary force; that it was the established custom of the railway company to give due notice and warning to all persons in or about such cars before moving or shunting other cars against the standing cars; and that such notice or warning was not given upon the occasion in question. The evidence, however, is that the notification or warning was exclusively for persons, not employees, engaged in unloading cars. There was no custom or duty of that kind in respect of employees engaged on or about the tracks. If there was a violation of duty, therefore, on the part of the railway company, it was not of a duty owing to Mihas; and the rule is well established that it is not sufficient for a complainant to show that he has been injured by the failure of another to perform a duty or obligation unless that duty or obligation was one owing to the complainant. In *Ches. & Ohio Ry.* v. *Nixon*, 271 U. S. 218, the facts were that a section foreman whose employment obliged him to go over and examine the track was on a tour of inspection. For that purpose he used a velocipede fitted to the rails. He was overtaken by a train and killed. The negligence charged was that the engineer and foreman of the train were not on the lookout; and the proof was to that effect. It was held that that duty was one which the railroad company might owe to others but not toward the class of employees to which the deceased belonged; and a recovery for his death was reversed. In

O'Donnell v. *The Providence and Worcester Railroad Company*, 6 R. I. 211, it was held that a statute giving a right of action to one injured by the neglect of the railroad company to ring the locomotive bell before making a highway crossing was designed exclusively for the benefit of persons crossing the highway, and one injured while walking along the track not at a crossing could not recover under the statute. The court said (p. 214):

"If the defendants have violated any duty owing from them to the plaintiff, and by means or in consequence of that violation the plaintiff has suffered injury, he has a right to compensation and damages at the hands of the defendants for such injury. In the language of the books, an action lies against him who neglects to do that which by law he ought to do, (1 Vent. 265; L Salk. 335,) and that, whether the duty be one existing at common law, or be one imposed by statute. In order, however, to a recovery, it is not sufficient that some duty or obligation should have been neglected by the defendants, but it must have been a neglect of some duty or obligation to him who claims damages for the neglect. In 1 Comyns's Digest, Action upon Statute, F, it is said, 'In every case where a statute enacts or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompense of the wrong done to him contrary to said law,' confining the remedy to such things as are enacted for the benefit of the person suing."

See also, *Pheasant* v. *Director General of Railroads*, 285 Fed. 342, 344; *C., N. O. & T. P. R. Co.* v. *Swann's Admx.*, 160 Ky. 458, 469.

There is nothing in the record to show that employees engaged in the switching operation knew or had reason to believe that Mihas was in any position of danger. In the absence of such knowledge or ground for belief, they were not required to warn him of the impending switching operation or take other steps to protect him. *Toledo, St. L. & W. R. R.* v. *Allen*, 276 U. S. 165, 173.

The evidence failing to show negligence on the part of the company, the motion for a directed verdict in favor of the petitioner should have been granted.

Judgment reversed and cause remanded for further proceedings not inconsistent with this opinion.